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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **AMERICAN AIRLINES, INC.** **and** **BRITISH AIRWAYS PLC** **under 49 U.S.C. §§ 41308-41309 for approval of and antitrust immunity for agreement**	**Docket OST-2001-10387 - 37**
Joint Application of **AMERICAN AIRLINES, INC.** **and** **BRITISH AIRWAYS PLC** **under 14 C.F.R. Part 212 for statements of authorization (blanket codesharing) and under 49 U.S.C. § 40109 for related exemption authority**	**Docket OST-2001-10388 - 37**

ANSWER OF NORTHWEST AIRLINES, INC., IN SUPPORT OF MOTION OF CONTINENTAL AIRLINES, INC.

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Dated: September 5, 2001

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Date: September 5, 2001

ANSWER OF NORTHWEST AIRLINES, INC., IN SUPPORT OF MOTION OF CONTINENTAL AIRLINES, INC.

Northwest Airlines, Inc., ("Northwest") hereby answers in support of the motion of Continental Airlines, Inc. to dismiss the joint applications of American Airlines and British Airways for antitrust immunity and code-share authority and, in the alternative, to suspend all procedural dates until such time as the United States and the United Kingdom have signed an open skies agreement that provides for de facto U.S.-U.K. open skies, including a satisfactory

mechanism assuring adequate, immediate and long-term U.S. carrier access to slots and terminal facilities at Heathrow Airport.[1]

ARGUMENT

1. Until the United States and the United Kingdom Reach Agreement on Open Skies and Access to Heathrow, the Parties are Unable to Evaluate or Comment on the Competitive Effects of the America/BA Applications.

This case is unique in scope and significance. The proposed American/British Airways alliance represents the consolidation of the two largest firms in the largest U.S.-foreign country market (the U.S.-U.K. market) and in the largest U.S.-foreign point market (U.S.-Heathrow). At the heart of the anti-competitive effects of the proposed alliance is the inability of new entrants to gain competitive access to Heathrow Airport. Commenting on the first American/British Airways immunity application, the Department stated:

> U.S. airlines have had little or no opportunity to enter or expand service at London's Heathrow Airport, British Airways' hub....Obviously, we could not grant approval and immunity for the Joint Applicants' alliance unless other U.S. airlines could compete effectively in the markets affected by the Alliance, since otherwise the Alliance would not be in the public interest.[2]

The potential means of addressing the effects of the proposed American/British Airways alliance is an open skies agreement that provides for de facto open skies, including precisely defined access for U.S. carriers to adequate slots and facilities at Heathrow and a mechanism that guarantees such access immediately and over the long term. The Department has clearly

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[1] Although Northwest supports Continental's motion, Northwest is this date filing a separate Motion for Extension of Procedural Dates proposing an alternate form of relief, should the Department deny Continental's motion.

[2] Order 97-3-34 at 4.

acknowledged that open skies, including adequate access to Heathrow, is a pre-condition to a serious evaluation of an immunized American/British Airways alliance:

> The Department made clear that *de facto* open skies in the case of the United Kingdom must include adequate provision for new and expanded U.S. carrier service through London airports, particularly Heathrow, and that the ability of U.S. carriers to provide such service notwithstanding the constraints at Heathrow would be a critical consideration in our evaluation of the proposed Alliance.[3]

In order for the parties and the Government to evaluate and comment on the effects of the new proposed American/British Airways alliance, they must know the facts, including, in particular, the amount of access to Heathrow that the U.K. Government is willing to guarantee for U.S. carriers. Without this information, a full and meaningful evaluation is not possible. Without this information, this proceeding will be a hollow and futile exercise.

At this point in time, there is not even a serious prospect that the parties will have the information they need to evaluate the proposed alliance. Not only have the U.S. and the U.K. not reached an agreement on open skies or Heathrow access, the two sides have not seriously begun to negotiate the issues. Nor have they even scheduled dates for further bilateral talks on the possibility of an open skies agreement.

Under the circumstances, there is no demonstrable need for the Department to begin processing the applications at this time. There also is no demonstrable reason why interested parties should be required at this time to respond to the American/BA applications within any established timeframe, much less the absurdly truncated timeframe directed by the Department. As argued by Continental, the Department should either dismiss the applications or suspend all

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[3] Order Terminating Proceedings, Order 99-7-22 at 2.

procedures until such time as the United States and the U.K. have signed an open skies agreement providing for satisfactory access to Heathrow.

2. The Schedule Established by the Department Would Repeat the Mistakes of 1997-1998.

Absent the relief requested by Continental, the Department will force the parties to follow the same unnecessary, wasteful and ultimately ill-advised path that the parties were required to follow in connection with the first American/BA application for antitrust immunity. Over the very strong objections of numerous U.S. carriers and civic parties, the Department determined that it was in the public interest to begin processing the American/BA application concurrently with U.S. efforts to negotiate an open skies agreement with the U.K. Order 97-3-34. This decision to "parallel track" the regulatory proceedings and bilateral negotiations was unprecedented and was plainly at odds with the Department's otherwise iron-clad policy of not granting antitrust immunity to a carrier alliance in the absence of de facto open skies.

In that case, Delta Air Lines requested a stay of all procedures until the later of the execution of a U.S.-U.K. open skies agreement providing for de facto open skies and the completion by the Justice Department of its review and recommendation with respect to the proposed alliance. Numerous U.S. interests supported Delta's motion. Delta and its supporters correctly noted that a "parallel track" procedure was contrary to U.S. policy and that the proposed alliance could not be evaluated properly (by the parties or the government) until the precise nature of "open skies" – including the extent of guarantees of adequate slots and facilities at Heathrow – was clearly established. Id. at 6.

The Department denied Delta's motion and subsequently established procedures that forced the parties and the Department to engage in costly and wasteful efforts to assess the

proposed alliance.[4] Order 98-3-31. These efforts necessarily occurred in a vacuum, as an open skies agreement was not reached and no one knew what the parameters of "open skies" – including Heathrow access -- might be. Ultimately, the Department determined that the U.K. had "not made sufficient progress internally in resolving the issue of London airport access to permit the continuation of productive negotiation of ...an Open-Skies agreement." Order 99-7-22 at 2. The Department dismissed the American/BA application and terminated the proceeding.

It was a mistake in 1997 for the Department to begin processing the American/BA application in the absence of an open skies agreement with the U.K.; it will be an even more egregious mistake for the Department to follow the same course in 2001. The fundamental issues that led the Department to dismiss the first American/BA immunity application remain unresolved. It is not reasonable to assume that the U.K. will make "sufficient progress" regarding "London airport access" this time around. To the contrary, with the lessons of 1997-99 fresh in mind, there is every reason to expect that any such progress will not be easily gained. Thus, rather than rushing to implement a procedural schedule, the Department should proceed deliberately and with caution. Accordingly, as requested by Continental, the Department should dismiss the joint applications or, in the alternative, immediately suspend all procedures pending the signing of a satisfactory open skies agreement with the U.K., as discussed above.

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[4] Despite denying Delta's motion, the Department did not require answers to be filed until May 1998, 16 months after the immunity application was filed. This is in stark contrast to the rushed schedule established by the Department in this case.

3. Other Considerations Militate against Establishing a Procedural Schedule at this Time.

In addition to the unavoidable absence of a U.S.-U.K. open skies agreement, there are other factors that establish that it is premature and ill-advised to begin processing the American/BA applications at any time in the near future.

A. United/British Midland

United Air Lines and bmi British Midland have each formally announced that they soon will be applying to the Department for antitrust immunity for their own alliance.[5] Such a grant of immunity, of course, is not possible in the absence of a satisfactory U.S.-U.K. open skies agreement. The Department's consideration of the proposed United-British Midland alliance will unquestionably involve analysis of many of the same issues that lie at the heart of the American/BA application. Indeed, in their immunity application American and British Airways repeatedly point to a United/British Midland alliance as a favorable development that would support an award of immunity to American and British Airways because a United/British Midland alliance would (so the argument goes) provide a competitive counterweight to a combined American/BA at Heathrow. See, e.g., Immunity Application at 8-9, 13-14.

The Department's Scheduling Order fails to account for the impending United/British Midland application. In view of the interrelationship between the two proposed alliances and the commonality of the issues and evidence that will be relevant to both, the two antitrust immunity applications should be considered simultaneously so as to allow the parties and the Department to assess both applications on a comprehensive basis. Indeed, a record in the American/BA

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5 See bmi Press Release, June 21, 2001; United Press Release, June 21, 2001.

proceeding that does encompass facts and evidence relating to the indisputably relevant United/British Midland application would be incomplete and contrary to fundamental requirements of due process. Accordingly, the Department should – at the appropriate time following the filing of the United/British Midland application – issue a notice establishing a coordinated procedural schedule for the two applications. As discussed above, the "appropriate time" would be after the United States has signed a satisfactory open skies agreement with the U.K.

B. The European Court of Justice "Open Skies Case"

As all parties are aware, the European Court of Justice ("ECJ") is currently adjudicating an action initiated by the European Commission ("EC"), in which the EC has asserted (a) that eight Member States of the European Union, including the U.K., lack the competence to negotiate bilateral aviation agreements with the U.S. and (b) that the existing bilateral agreements between those Member States and the United States, including the U.S.-U.K. Bermuda II agreement, as amended, violate provisions of the Treaty of Rome. The parties have presented their cases, and the next procedural step should be the publication of the opinion of the ECJ Advocate General (equivalent to a recommended decision). This is expected to occur early this fall. It seems likely that the ECJ will then issue a final decision during the First Quarter of 2002.

The pendency of the ECJ case and the possibility of a decision adverse to the Member States have been rumored in the press to be factors pressuring the U.S. and U.K. governments to move quickly and reach a new bilateral agreement before the ECJ issues its decision. There are, however, countervailing considerations. The EC competition authorities will conduct a review of the proposed American/BA alliance, just as they did in connection with the first American/BA

alliance. It is likely that the EC may not wish to complete or announce the results of that review until after the ECJ has issued its decision, for two reasons. First, the EC may not wish to take any action, such as announcing the results of its review, that might in any manner prejudice the EC's case before the ECJ. Second, the EC may wish to know the outcome of the ECJ proceeding before completing its competition review so that it will be conducting that review in the context of whatever bilateral and regulatory changes, if any, the ECJ's decision compels. Given that American and British Airways could not implement their alliance without EC approval and given that EC review of the alliance may not be completed for many months, there is no need or reason for the Department to implement a procedural schedule at this time. Once again, the Department should wait until a satisfactory U.S.-U.K. open skies agreement has been signed.

C. The EC Slot Buy/Sell Rule

Earlier this year the EC issued its long-anticipated proposal to revise the EC slot regulation (EU 95/93) to prohibit the sale or lease of slots at all EU airports, including Heathrow. The existence of meaningful access to Heathrow slots will be a critical issue in this proceeding, and American and British Airways argue that leasing slots is an important means by which new entrants can gain access to Heathrow. See, e.g., Immunity Application at 92. The EC proposal, if enacted, would foreclose that possibility.[6] If U.S. carriers and other parties concerned about access to Heathrow are to have a fair opportunity to answer meaningfully in this proceeding, as they must, then they must have benefit of all the facts that bear on whether, how, and when

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[6] Northwest does not concede that slot leasing represents a meaningful means of gaining access to Heathrow slots.

Heathrow slots might be made available in the wake of an approved American/BA alliance and/or an approved United/British Midland alliance. If that is to happen, the date for answering the American/BA applications must be a substantial period after final action is taken on the EC's proposed rule. This would be after a satisfactory U.S.-U.K. open skies agreement has been reached.

WHEREFORE, Northwest Airlines urges the Department to grant the motion of Continental Airlines to dismiss the applications or, in the alternative, to suspend all procedural dates until after the United States and the United Kingdom have signed an open skies agreement providing for de facto open skies, including firm assurances of adequate and satisfactory access to Heathrow, as discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2001, I caused a copy of the foregoing Answer to be served by hand or by first class mail, postage prepaid, upon the following persons:

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